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Supreme Court of the United States

OCTOBER TERM, 1966

No. 520

JOSEPH T. NEWTON, JR., *et al.*, PETITIONERS,

versus

SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INCORPORATED, BY AND THROUGH ITS OFFICERS GEORGE TUPPER AND WALTER BELL, JR., INDIVIDUALLY AND AS REPRESENTATIVES OF ALL OF THE MEMBERS OF SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INCORPORATED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners herein [1] pray that a writ of *certiorari* issue to review the judgment of the United States Court of

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[1] The Petitioners include Joseph T. Newton, Jr.; Commodore Point Terminal Corp. (Fla.); Piggly Wiggly Corporation (Del.); Piggly Wiggly Wholesale, Inc.; Paradise Ice Cream Company, Inc.; Greenbax Stamp Company; and Piggly Wiggly Columbus Corporation; Piggly Wiggly Dupont Company, Inc.; Piggly Wiggly of Fountain Inn, Inc.; Piggly Wiggly Greenwood, Inc.; Piggly Wiggly Mullins, Inc.; Piggly Wiggly of Ninety Six, Inc.; Piggly Wiggly of Orangeburg, Inc.; Piggly Wiggly Produce Company; Piggly Wiggly St. Andrews, Inc.; Piggly Wiggly 76, Inc.; Piggly Wiggly No. 69, Inc.; Piggly Wiggly Suddeth Corporation; Piggly Wiggly Walterboro, Inc., Individually and as Representative of all of the Franchised Piggly Wiggly Stores in the State of South Carolina of whom Petitioner Joseph T. Newton, Jr., is Part Owner, and of all Franchised Piggly Wiggly Stores in the State of South Carolina who own an interest in Petitioner Paradise Ice Cream Company, Inc.; all Franchised Piggly Wiggly Stores in the State of South Carolina of whom Petitioner Joseph T. Newton, Jr., is Part Owner; all Franchised Piggly Wiggly Stores in the State of South Carolina who own an interest in Paradise Ice Cream Company, Inc.

Appeals for the Fourth Circuit entered in this case on April 4, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, entered on April 4, 1966, is reported in 360 F. (2d) 414. It is reprinted in Appendix A hereto, p. 12, *infra*.

The opinion of the United States District Court for the Eastern District of South Carolina entered on May 15, 1965, is reported at 241 F. Supp. 259. It is reprinted as Appendix "B" hereto, p. 23, *infra*.

The opinion in conflict with the instant opinion of the Fourth Circuit is *Volasco Products Co. v. Lloyd A. Fry Roofing Company*, 308 F. (2d) 383 (6 Cir., 1962), *certiorari* denied, 372 U. S. 907 (1963). It is reprinted as Appendix "C", p. 40, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 4, 1966. No petition for rehearing was filed. On June 29, 1966, Associate Justice Potter Stewart signed an Order extending the time for filing this petition for writ of *certiorari* to and including September 1, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

In a suit for treble damages under Section 4 of the Clayton Act, is a supplier too remote and too far removed from the direct injury to recover damages resulting from the violation of the antitrust laws directed against the suppliers' customer?

STATUTE INVOLVED

SECTION 4, CLAYTON ACT, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S.C. § 15.

> Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including attorney's fee.

STATEMENT

The Petitioner, Newton, a food wholesaler, organized the Piggly Wiggly chain of retail stores in South Carolina. For years he tried to obtain from the dairy distributors a wholesale price for milk. The dairies refused. Thereupon, Newton and others purchased a dairy, Petitioner Paradise, and commenced selling milk wholesale to the Piggly Wiggly stores and others. This permitted these stores to sell at a sharply reduced price from that prevailing for door-to-door delivery. The Dairy Commission of South Carolina, which is distributor-oriented and controlled, immediately declared that the dairy industry was threatened with economic chaos. To prevent this chaos the Commission, on May 1, 1963, promulgated Regulation 4 (i), mandating that milk could not be sold by a distributor for less than the cost of processing and delivery. Paradise then requested the Commission to determine its cost, and an audit was commenced; but later the Commission withdrew, refusing to determine a cost. Paradise then petitioned the State Circuit Court to require the Commission to grant a hearing, which was ordered. The Commission determined that the cost for the processing and delivery of a half-gallon of pasteurized, homogenized, Class I, Gade A milk, by drop-shipment deliv-

ery, was forty-eight (48¢) cents. Paradise appealed, and the Court again required the Commission to give a new hearing. Extensive audits and hearings were conducted, but the Commission again refused to determine a cost. This refusal was appealed to the State Circuit Court, which found a cost for one-half gallon of milk from Paradise at 41.767¢. The Commission, in an attempt to contravene this finding, summoned Paradise for a new series of hearings, finding the cost at 46.664¢. On Appeal, the Circuit Court reversed the Commission, again fixing the cost at 41.767¢.

Throughout all these proceedings the principal Respondent, George Tupper, President of the Respondent South Carolina Council of Milk Producers, sat as a Commission member and refused to disqualify himself. At each stage of the two-year proceedings, whether before the Commission, the State Circuit Court, or the State Supreme Court, the issues of price discrimination, unfair practices, and damage to the Respondents were considered. And the final determination in the State Courts was that the Petitioners' sale of milk to its retail stores was above cost and in conformance to State-imposed pricing and practices. (See Appendix "B", p. 23.)

The Respondents' next maneuver was to institute the within treble damage suit on November 12, 1964. First, they incorporated the milk producers association into a nonprofit corporation to save the Respondent farmers harmless, Next, the Respondents' processors who would be responsive to a judgment were excluded; and, knowing that counsel fees are not awarded for the successful defense of a treble damage suit, they set out in their Complaint as an antitrust violation the same facts and circumstances that had been the subject of controversy in the State Courts for two years. But to do this the Respondents restricted themselves to farmers or suppliers. None of the Petitioners

are farmers or suppliers, but rather the Petitioners consist of a milk distributor, a wholesale grocer, retailer grocers, a trade stamp company, and a realty development corporation. The Petitioner milk distributor, Paradise, does business with farmers or suppliers who are not parties. Accordingly, the Respondent farmers or suppliers were not in direct relationship to or in competition with any of the Petitioners. Assuming a violation and injury, the Respondents' damage was consequential. The Petitioners moved for Summary Judgment under *Volasco*, ". . . that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of antitrust laws directed against the supplier's customer." (308 F. (2d) at p. 395.) The Petitioners filed a supporting Affidavit under Rule 56, showing that all of the Respondents were suppliers to customers not a party to the within action; and that none of the Petitioners were farmers or suppliers. The Respondents filed no counter-Affidavit or produced no fact to the contrary, but rather stipulated that any persons who processed or distributed the Respondent's milk were not parties to this action. (See Appendix "D", p. 61.) The Respondents argued that the milk they sold was the same product distributed by the Petitioners; that the conspiracy was aimed at them; that they were in the target area of the conspiracy; that the damages had been passed on to them, and that Summary Judgment should be used sparingly in antitrust cases. The District Court found that, irrespective of these arguments, there was no genuine issue of fact to be tried on the Respondents being suppliers and that as suppliers they were not entitled to sue under Section 4 of the Clayton Act. On Appeal from Summary Judgment the Fourth Circuit, citing *Volasco, supra,* and *Snow Crest Beverages v. Recipe Foods, Inc.,* 147 F. Supp. 907 (D. Mass. 1956), reversed the District Court, stating:

However, if either of the cited cases be read declaring that a supplier who is not in privity or competition with one guilty of antitrust misconduct, but whose business is proximately affected by such misconduct, can *never* have a claim for antitrust damages against the wrongdoer, we could not follow the decisions that far.

REASONS FOR GRANTING THE WRIT

1. *South Carolina Council, infra,* and *Volasco, supra,* are irreconcilable. The Sixth Circuit, in a similar action in 1962, with *certiorari* denied, stated in *Volasco*:

> It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the suppliers' customer.

The Fourth Circuit states now:

> This application of the Federal Statutes is in our judgment too narrow . . . we could not follow the decisions that far.

2. The general tort principle of limiting the right to sue for damages to parties proximately injured will be repudiated. The principle was laid down by Mr. Justice Holmes in 1918 in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 533:

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages, at least, is not to go beyond the first step.

While admittedly Section 4 of the Clayton Act gives relief to "any person who shall be injured", the courts

have restricted those entitled to sue in accordance with the principle of *Darnell-Taenzer, supra.* Treating an antitrust suit as a damage action requiring the application of accepted tort principles, the Court stated in *Harrison v. Paramount Pictures,* 115 F. Supp. 312 (E. D. Pa. 1953); affirmed 211 F. (2d) 405, (3 Cir., 1954); *Certiorari* denied, 348 U. S. 828 (1954):

> Whether or not any antitrust plaintiff has been injured in his property depends on two things, first, what the nature of the property is and, second, how remote the injury is.

In 1956, applying the same principle in *Snow Crest Beverages v. Recipe Foods, Inc.,* 147 F. Supp. 907, 909 (D. Mass. 1956), Judge Wyzanski stated:

> It is well settled that despite its broad language § 4 of the Clayton Act does not give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws. Recovery under that section has been denied to a landlord of a competitor injured by the defendant although the landlord had a percentage rental. *Melrose Realty Co. v. Loew's, Inc.,* 3 Cir., 1956, 234 F. (2d) 518, 519, *certiorari* denied 1956, 77 S. Ct. 128. Likewise, recovery was denied to a patent licensor who would have received royalties from one of the defendant's competitors injured by the defendant's violations of the antitrust laws. *Productive Inventions, Inc. v. Trico Products Corp.,* 2 Cir., 1955, 224 F. (2d) 678, *certiorari* denied 1955, 350 U. S. 936, 76 S. Ct. 301. The same attitude has precluded employees of an injured competitor from recovering under the antitrust acts. *Carey v. Boston Ice Co.,* D. C. Mass. 1913, 207 F. 465, 446; *Gerli v. Silk Association of America,* D.C.S.D.N.Y. 1929, 36 F. (2d) 959; *Walder v. Paramount Publix Corp.,* D.C.S.D.N.Y. 1929, 132 F. Supp. 912, 916. Without trying to spell out in detail the justice

for these decisions, it may be noted that if they had gone the other way, there would as as result of the treble damage provisions of the antitrust acts have been given in each case to the Plaintiff what has sometimes been called a "windfall". *Conference of Studio Unions v. Loew's Inc.*, 9 Cir., 193 F. (2d) 51, 55. In effect, businessmen would be subjected to liabilities of undefined scope for conduct already subject to drastic private remedies. Courts aware of these considerations have been reluctant to allow those who were not in direct competition with the defendant to have a private action even though as a matter of logic their losses were foreseeable. Congress has failed to amend the antitrust laws on this point in the face of repeated decisions. It seems to have been content for the judiciary to take a position narrower than they often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery.

The *Snow Crest* decision in 1956 had followed so closely on the heels of *Karseal Corporation v. Richfield Oil Corporation,* 221 F. (2d) 358 (9 Cir., 1955), that there was some question of whether or not the Courts considered the same principles. But in 1962, with *certiorari* denied by the Supreme Court in 1963, the *Volasco* decision laid to rest, as the District Court stated in the case at bar: ". . . any doubt that directness of injury is fundamental to a suit." The District Court distinguished *Snow Crest* from *Karseal* in its Order, (See Appendix B, p. 23); and the *Volasco* decision clarifies the discoloring of *Snow Crest* by *Congress Building Corporation v. Loew's,* 246 F. (2d) 587, (7 Cir., 1957). Speaking of *Congress, Volasco* stated:

> Counsel for plaintiff quoted from the opinion in this case, "Not only is this 'limitation' (that is that a supplier is not directly injured) without support in the language of Section 4, but it appears to have been implicitly rejected by the Supreme Court." In support

of this statement, the court cites *Radovich v. National Football League*, 352 U. S. 445, 77 S. Ct. 390, 1 L. Ed. (2d) 456, and *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652.

We do not find that these cases either reject or accept this limitation. It was not in issue in either case. Radovich was a football player and he brought an action against the National Football League for violation of the antitrust laws. He was the person directly injured by the alleged illegal conduct. The Court said Congress had allowed for private enforcement of the antitrust laws by an *aggrieved* party and that the laws protected the *victims* of the forbidden practices, as well as the public. *Indirect and remote parties cannot be read into the word 'victims'.* In the *Bigelow case,* the plaintiffs were the owners and operators of a theatre and were the ones directly injured by the alleged antitrust law violations of the defendant. In this case, the issue involved the proof of damages. The proof of plaintiffs' damages could not be calculated with certainty. The Court said: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." (327 U. S. p. 265, 66 S. Ct. p. 580.) This involved the damages of the plaintiffs who were directly injured and cannot be extended to mean indirect or remote parties such as suppliers. (Italics supplied.)

3. If suppliers not in privity or competition with one guilty of antitrust misconduct are allowed to sue, then the court will have opened a Pandora's Box of suits that Congress never intended under Section 4 of the Clayton Act. An explosion of cases for consequential injury would result. Electricity users the country over could immediately grab their lawyer and race for the Court House. Similarly could sugar, chemical, automobile users, *ad infinitum.*

4. In the case at bar, the court will have opened the door for treble damage relief to the Respondents' employees

and suppliers of feed, fertilizer, milking equipment, farm equipment, tractors, trucks, Ford Motor Company, etc., and to the Respondents' distributors' employees, customers, and suppliers of cartons, glass bottles, vitamins, bacon, eggs, cheese, orange juice, equipment, letterheads, office supplies, electricity, gas, Humble Oil Company, *ad infinitum*.

CONCLUSION

For these reasons this Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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August 30, 1966.

APPENDIX

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APPENDIX A

OPINION

Filed and Entered April 4, 1966

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 10,138.

South Carolina Council of Milk Producers, Incorporated, et al., Appellants,

versus

Joseph T. Newton, Jr., et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. ROBERT W. HEMPHILL, DISTRICT JUDGE.

(Argued January 4, 1966. Decided April 4, 1966.)

Before HAYNSWORTH, Chief Judge, and BRYAN and BELL, Circuit Judges.

ALBERT V. BRYAN, Circuit Judge:

The Clayton Act, Section 4, 15 USC 15[1], the Federal District Court in South Carolina has held, does not in circumstances here authorized an action by appellant milk producers against appellee wholesale and retail grocers. The complaint charged them with combining and conspiring in restraint of trade and commerce in groceries, including milk and dairy products, in an attempt to monopolize trade and

[1] Section 4: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold for damages by him sustained. . . ."

commerce in these commodities in violation of the Sherman Act, 15 USC 1 and 2[2] and to the injury of the plaintiff.

Accordingly, on *motion for summary judgment,* the Court dismissed the suit of the South Carolina Council of Milk Producers, Incorporated, its president and secertary, against Joseph T. Newton and others, who were as owners, franchisers or operators doing business in South Carolina under the trade name Piggly Wiggly. The District Judge reasoned that because of "lack of privity of contract, direct relationship or mutual competition" between the milk producers and the defendants, the producers were not persons injured "by reason of anything forbidden in the antitrust laws", the predicate of liability under the Clayton Act. Concluding that the complaint states a case upon which relief can be granted, we reverse and remand the case for trial.

The South Carolina Council of Milk Producers, Incorporated, is a non-profit organization chartered by South Carolina with about 400 members who are milk producers in that State as well as in North Carolina and Georgia. The president and secretary of the Council, who are members and also milk producers, sue here as individuals and as representatives of all other members.

The defendants and their connections as alleged in the complaint are as follows:

1. *Commodore Points Terminal Corporation,* chartered in Florida with its principal place of business there, is engaged in the manufacture of store fixtures. It owns and controls

2. *Piggly Wiggly Corporation,* known *as Trade Name Corporation,* chartered by Delaware with its principal establishment in Florida and the owner of the trade name Piggly Wiggly. It grants franchises throughout the country for the use of the trade name and renders assistance to

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[2] Section 1: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . ."

Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ."

the franchisees, including extension of credit and guaranteeing their financial obligations. This corporation also empowers wholesale grocers to franchise retail grocery stores and assists the latter in the conduct of their businesses, receiving a percentage of the gross sales of all franchised Piggly Wiggly Stores. It authorized

3. *Piggly Wiggly Wholesale, Inc.*, which is engaged in buying and selling groceries with its principal location in South Carolina, to award franchises for the use of the Piggly Wiggly trade name. At the same time it performs various services for the franchised retail stores, for which Wholesale receives a percentage of their sales as its compensation.

4. *Joseph T. Newton, Jr.*, whose office is in South Carolina, is alleged to be "an owner, officer, director or stockholder of some or all of the corporations defendant" here.

5. *Paradise Ice Cream Co., Inc.*, a South Carolina corporation with its principal place of business there, was purchased within the two years preceding the institution of this suit by defendant Wholesale and other defendants herein, and is now operated by them as a milk processing plant.

6. *Greenbax Stamp Co.*, incorporated in South Carolina with its office at Charleston, is owned by defendant Wholesale and/or defendant Newton and primarily engages in issuing and handling trading stamps for use by the franchised Piggly Wiggly stores. At times it has loaned money or extended credit to the defendant Paradise.

7. The remaining defendants are thirteen Piggly Wiggly retail stores located in South Carolina and franchised by Wholesale. They are alleged to own an interest in the defendant Paradise and to be representative of all the other franchisers, as a class, doing business in South Carolina. Leave is asked to join the unnamed retailers as defendants as and when they become known to the plaintiffs.

Alleging that all of the defendants are "regularly engaged in interstate commerce in groceries and other items customarily sold in grocery stores including milk and milk products", the complaint accuses them of engaging, since January 1963, in a combination and conspiracy in restraint

of trade and commerce in groceries, especially milk and dairy products, in an attempt to monopolize such trade and commerce, contrary to sections 1 and 2 of the Sherman Act.

After describing the interstate phases of the operation, the aim of the combination, conspiracy and attempted monopolization and its accomplishment are next outlined. The sale of milk and its products is not used by the defendants for immediate profit but rather as a "drawing card" or "attraction" to bring trade in all groceries to the Piggly Wiggly stores. The strategy was to provide milk to these retailers for sale to the public below cost or well under the market price. To this end they acquired a milk processing plant—the defendant Paradise Ice Cream Co., Inc.—at Orangeburg, South Carolina, and there processed what was trade named "Paradise" milk. This commodity was employed as a "loss leader". It was priced to Piggly Wiggly stores at such a low figure as to cause the Paradise plant to operate at a loss.

Further, when the giving of extra or "bonus" stamps issued by defendant Greenbax Stamp Company, with purchases of Paradise milk, did not lure grocery patrons in sufficient numbers, Piggly Wiggly stores were directed to sell half-gallons at 3 cents, despite the prevailing price of 53 cents. The milk was invoiced to the stores at 48 cents with a discount of 10 cents. When the South Carolina Milk Commission forbade defendant Paradise to sell for less than 48 cents a half-gallon *wholesale,* Paradise billed the retailers at 48 cents; retailers sold at 44½ cents; and Paradise rebated them the amount of their loss.

Supplementary allegations charge the defendants with persisting in these practices and in selling at "unreasonably low prices", each playing a part in the scheme to his or its advantage. The consequences of this conduct, the complaint summarizes, have been and are the unlawful diviresion to defendants of "trade and commerce in milk and milk products between producers and processors and between processors and retailers and consumers".

According to the complaint, the result of the conspiracy has been to destroy the market price of milk in South Carolina to the point of threatening the economic existence of

the dairy industry. This campaign, it is stressed, has caused milk and milk products to be sold in many South Carolina markets at destructively low prices contrary to the public policy of the State. Particularly, the grievance of the plaintiffs is that the program of the defendants "has caused the producers [such as themselves] in the State of South Carolina to have to sell their products at prices below cost or so near cost as to make their operations unprofitable". In this particular, the plaintiffs plead that as producers they have sustained losses on some milk sold and have been deprived of profits they would otherwise have realized on other milk, to their damage in the sum of $500,000.

The motions to dismiss were grounded, and sustained by the District Judge, on a conclusion from the following undisputed facts. The plaintiffs did not directly sell to the defendants, the defendants were not producers in competition with the plaintiffs, and the plaintiffs' commodity was raw milk while the defendants' commodity was processed milk. The conclusion was that in these circumstances no "privity of contract, direct relationship, or mutual competition" existed between the plaintiffs and the defendants, hence there was "no directness of injury", without which no antitrust cause of action arose, regardless of the illegality of the alleged combination, conspiracy or attempted monopolization.

This application of the Federal statutes is, in our judgment, too narrow. The Clayton Act, §4, 15 USC 15, gives relief by way of damages to "any person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws." Section 4 does not in its terms limit relief to persons in a direct contractual or competitive status with the persons whose conduct allegedly violates the proscriptions of the Sherman Act. Moreover, while there are to be found authorities upholding as essential in an antitrust cause those elements now pressed by the defendants as absent here, we do not think the predominant decisional law so straitens the intent of the Clayton Act.

To begin with, the reliance on *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3 Cir. 1910) for this contention is not secure. It involved an attempt by a stockholder-creditor-

employee of a corporation to sue individually for antitrust injuries inflicted upon the corporation. Plainly, the injury to the plaintiff was derivative and the corporate entity intervened to suffer the damage immediately and entirely.

Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956) is also cited by the defendants for their position. Admittedly, the court there read section 4 of the Clayton Act not to "give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations of the antitrust laws". Consequently, it refused recovery to a supplier of a seller who was injured by unlawful combinations or restraints by competitors of the seller. Id. at 909. Of similar tenor are expressions and the holding in *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F. (2d) 383 (6 Cir. 1962), cert. den. 372 U. S. 907 (1963).

In each of these cases there were two corporations with common ownership. One corporation supplied the other an ingredient of the final product sold by the second corporation in competition with the defendants, whose conduct constituted the antitrust violations. The decision in both instances was that the first or supplier corporation could not sue. One ground of the decision was that the injury was primarily to the corporation marketing the final product and the supplier did not gain a right of action by virtue of the joint corporate ownership. Our case differs from those two, in that here the item sold by the plaintiffs is not simply an ingredient of the corresponding commodity sold by the defendants but, as we later emphasize, is essentially the equivalent commodity. However, if either of the cited cases be read as declaring that a supplier who is not in privity or competition with one guilty of antitrust misconduct, but whose business is proximately affected by such misconduct, can *never* have a claim for antitrust damages against the wrongdoer, we could not follow the decisions that far.

If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured

thereby, then he has standing to sue under section 4. See *Conference of Studio Unions v. Loew's Inc.*, 193 F. (2d) 51 (9 Cir. 1951), cert. den., 342 U. S. 919 (1952); *Karseal Corp. v. Richfield Oil Corp.*, 221 F. (2d) 358 (9 Cir. 1955). This sector is sometimes designated as the "target area" of the defendants' illegal practices.

That without allegations of directness of injury the present complaint made out a cause of action under the antitrust statutes, is manifest from the language of *Radovich v. National Football League*, 352 U, S. 445, 453-54 (1957):

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party ....In the face of such a policy this Court should not add requirements *to burden the private litigant beyond what is specifically set forth by Congress in those laws.*" (Accent added.)

Consider, too, the observation in Note, 64 Colum. L. Rev. 570, 585 (1964) that the Supreme Court's "pronouncement that the statutory language sets the *only* requirements that plaintiff must meet indicates that judicial glosses may be ill-founded." Commenting on judicially-imposed tests of directness of injury, *i. e.* "direct relations" and the "object of the violation", the author has this to say:

> "These tests, although seeming to have the virtue of simplicity, fail to meet the real issue: the statutory purpose. To ask whether the plaintiff was 'directly injured' is to ask the wrong question; what the court should ask is whether the plaintiff (1) is, himself, within the class of persons entitled to protection and (2) alleges an injury of a type the statute was intended to guard against .... Its purpose is so broad and its mandate so clear that any person who can

show damage *prima facie* should be within the protected class. . . ."

The defendants' further argument that their product—pasteurized, homogenized, fortified and packaged milk—is different from the plaintiffs'—raw milk—only serves their contention that the parties are not competitors. It does not establish that the plaintiffs were not injured by the alleged prohibited acts.

Moreover, it does not disclose a lack of competition. The difference between the states of the milk in the hands of the plaintiffs and the defendants is not so distinct as to categorize the plaintiffs as suppliers of a mere ingredient of the commodity sold by the defendants. Hence there is no warrant for dismissal of the action on the theory that suppliers have no cause of action.

In the latter respect the case is similar to the circumstances in *Karseal Corp. v. Richfield Oil Corp., supra,* 221 F. (2d) 358. There the supplier, Karseal, furnished wholesalers car wax in the same condition in which it would be retailed to the consumer. Karseal sued for an unlawful restraint imposed by Richfield upon its gas stations not to sell any car wax except that sponsored by Richfield. The suit was allowed against the argument that a supplier has no cause of action. The present action involving milk sold by the plaintiffs and defendants in essentially the same form, is thus within the rationale of *Karseal.*

A kindred point urged by the defendants, as noted previously, is that there was no cause of action because there was no privity of contract between the plaintiffs and the defendants, *i. e.* the plaintiffs not selling to the defendants. The answer is that the cause of action is not dependent upon a relationship, contractual or otherwise, between the claimant and the offender, so long as the injury is a proximate result of the misdoing.

Both of these arguments—absence of competition and relationship between the parties—have been authoritatively spiked. In *Karseal Corp. v. Richfield Oil Corp., supra,* 221 F. (2d) 358, 363, the Court states:

"The treble damage action is one for a tort and punitive and compensatory damages is the relief

granted. 'Under the Clayton Act the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of the wrongful acts.' *Clark Oil Co. v. Phillips Petroleum Co., supra,* 148 F. (2d) at pages 582-583. *Vines v. General Outdoor Advertising Co.,* 2 Cir., 1948, 171 F. (2d) 487, 491."

That decision was foretold by what was said in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U. S. 219, 236 (1948):

"The statute does not confine its protection to *consumers, or to purchasers, or to competitors, or to sellers.* Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Assn., supra,* at 553." (Accent added.)

The pivot of decision presently is whether the defendants' asserted conduct was the proximate cause of the plaintiffs' asserted injury. If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured "by reason of anything forbidden in the antitrust laws" as contemplated by the Clayton Act. *Productive Inventions, Inc. v. Trico Prods. Corp., supra,* 224 F. (2d) 678, 679 (2 Cir. 1955); *Karseal Corp. v. Richfield Oil Corp., supra,* 221 F. (2d) 358, 363 (9 Cir. 1955); *Conference of Studio Unions v. Loew's Inc., supra,* 193 F. (2d) 51 (9 Cir. 1951); *Schwartz v. Broadcast Music, Inc.,* 180 F. Supp. 322, 327 (S. D. N. Y. 1959). This is a critical determination which must be made by the court on the evidence offered by the plaintiff. At this point the court is in a position to foreclose claims by those only distantly or tenuously hurt. Thus the apprehension of "windfall" recoveries is dispelled. In this process the court would

rule upon the substantiality of the claim as it would in other damage actions.

In disapproving the dismissal of the present suit, we are not finding that the actions of the defendants were in truth the cause of the plaintiffs' damage. Our judgment is only that the complaint when measured against the defendants' moving papers for summary judgment, presents a triable antitrust issue. Dismissal of a Sherman Act claim on motion, we are admonished, should be "sparingly practiced". *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962). "[T]o state a claim upon which relief can be granted under that section [§ 1, Sherman Act] allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires." *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U. S. 656, 660 (1961). Disposition on motion is not warranted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957); *Bolick-Gillman Co. v. Contintental Baking Co.*, 278 F. (2d) 649, 650 (9 Cir. 1960); *Congress Building Corp. v. Loew's, Inc.*, 246 F. (2d) 587 (7 Cir. 1957).

As the District Judge noted, the objections raised by the motions to dismiss in respect to the nonjoinder of the other members and individual farmers of the South Carolina Council of Milk Producers, as well as the question of whether it is in truth a class action, are not fatal but are remediable by appropriate amendments.

On remand the case, after requisite amendment of the pleadings, should be accorded a plenary trial, since there are several genuine issues of fact to be settled. The judgment of dismissal will be vacated and the case returned to the District Court.

Reversed and remanded.

APPENDIX B

ORDER OF DISTRICT COURT GRANTING DEFENDANTS' MOTION

Originally instituted November 12, 1964, this action seeks relief to which plaintiffs allege entitled, for damages and injunctive relief under provisions of the Clayton Act, (15 U. S. C. §§ 15 and 16) and the Sherman Act, (15 U. S. C. §§ 1 and 2), particularly 15 U. S. C. § 15.[1] In addition to treble damages demanded in the amount of $1,500,000, plaintiffs ask attorneys' fees, costs and injunctive relief. In substance plaintiff alleges:

> Beginning on or about January, 1963, and continuing to the present time, defendants have been engaged continuously in a combination and conspiracy in restraint of trade and commerce in groceries and other items customarily sold in grocery stores, including milk and dairy products, in an attempt to monopolize trade and commerce in these commodities in violation of Sections 1 and 2 of the Sherman Act.[2]

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[1] Which provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[2] 15 U. S. § 1 provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in section 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract, or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with

In addition plaintiffs "spell out" the purported acts of violation.

Certain defendants plead:

All of the defendants, *Except* the Defendants Commodore Points Terminal Corp (Fla.) and Piggly Wiggly Corp. (Del.), move the Court under Rules 12, 17(a), and 56 of the Federal Rules of Civil Procedure as follows:

First: To dismiss the action because the Complaint fails to state a claim against the Defendants upon which relief can be granted. Section 4 of the Clayton Act provides, "That any person . . . injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor . . ." . . . 15 U. S. C. § 15. However, since the remedy is extraordinary, the language, "any person . . . injured" has been strictly construed, and the availability of the remedy has been limited to persons who stand in some immediate or direct relationship to the violator. The Complaint fails to show on its face any direct relationship between the Plaintiff and these Defendants, but rather shows some farmers proceeding against an individual, a distributor, a wholesaler, and some retailers with whom the farmers have never been in privity of contract or in direct relationship, nor are the parties competitors.

Second: To dismiss the action, because the Complaint fails to state a claim against these Defendants upon which relief can be granted. All of the acts complained of as being antitrust violations are acts affecting milk which is regulated by the South Carolina Dairy Commission. These same Defendants were attacked by these same Plaintiffs in conspiracy with others on the same charges of obtaining a dairy, and

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each other. 15 U. S. C. § 2 provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

then producing, distributing, and selling milk at a substantially reduced price. The Dairy Commission, as a result, promulgated Regulation 4 (I), providing that milk could not be sold below cost. Thereupon, numerous hearings were held before the Commission and the Courts, and a determination made that the milk prices of these Defendants were above cost, reasonable, and not injurious to the public.

That said pricing practices of these Defendants were imposed by the State as an act of government; and while regulated industries are not *per se* exempt from the anti-trust laws, the restraint, if any, as alleged in the Complaint, is not prohibited by the Sherman Act.

Third: To dismiss the action of the South Carolina Council of Milk Producers, Incorporated, and its representative action, on the grounds:

a. Its Complaint fails to state a claim against these Defendants upon which relief can be granted, because fundamental to a treble damage suit is the element of injury to the Plaintiff's business or property and the Complaint shows on its face that the Council is a non-profit association, has no business or property to be injured, and none is alleged; that a private association cannot bring suit for violations it merely observes, for this function is within the sole province of government agencies.

b. That the Council is not the real party in interest, for the Complaint shows on its face that the injury, if any, is not that of the Council and it cannot bring suit for damages to its members alone.

c. That the Council is not the real party in interest in that the Charter of the Council limits membership to producer associations and the Complaint shows on its face that the injury, if any, is to individuals.

Fourth: To dismiss the action under Section 3 of the Robinson-Patman Act for a civil action will not lie under this section.

Attached, and made Appendix I of this Order are Articles II, III, VII, and VIII of Plaintiffs' Charter application as

exhibit to substantiate. Also attached to and made a part of the motion as exhibits and to substantiate were an affidavit of counsel as to previous pursuing proceedings,[3] Articles of incorporation of South Carolina Council of Milk Producers Association, and Certificate of Charter Amendment of May 12, 1964 changing charter name of South Carolina Council of Milk Producers Association to South Carolina Council of Milk Producers.

Subsequently remaining defendants moved to dismiss, in language:

> The Defendants, Piggly Wiggly Corporation, a corporation of Delaware, and Commodore Point Terminal Corp., by their undersigned attorneys, respectfully move the Court for the entry of an Order herein dismissing this cause and Plaintiff's Complaint as to said Defendants upon the following grounds, severally, to-wit:
>
> 1. Said Complaint fails to state a cause of action as to those Defendants upon which the relief therein prayed can be granted by reason of each, both or either one of the following:
>
> (a) Article VII of the Charter of the Plaintiff, a copy of which is hereto attached, provides that membership in the Plaintiff South Carolina Council of Milk Producers shall be restricted to cooperative associations of milk producers. The individual "members" named in the Complaint purport to act in their own behalf and in behalf of a class, to-wit: All of the "members" of the Plaintiff South Carolina Council of Milk Producers. Since the Plaintiff South Carolina Council of Milk Producers is alleged in the Complaint to be a non-profit member corporation, it is axiomatic that neither the provisions of the Clayton Act (15 U. S. C. Sections 15 and 16) nor of the Sherman Act (15 U. S. C. Sections 1 and 2) are available to it. Hence, proper Parties Plaintiff, as alleged in the Complaint, either do not exist or are repugnantly and improperly joined to create a fatally defective multifariousness.

[3] Attached and made Appendix II of this Order.

(b) Said Complaint fails to state with sufficient particularity any act or action either of omission or commission by which these Defendants, or either of them engaged in any conspiracy to the detriment of the Plaintiffs or anyone.

2. Said Complaint fails to state a cause of action as to these Defendants upon which the relief therein prayed can be granted by reason of those grounds severally alleged in the Notice of Motion and Motion to Dismiss filed herein by the other Defendants. By this reference, said grounds are specifically adopted by these Defendants as additional grounds for this Motion.

It appearing that the first motion to dismiss, as set out in the second paragraph of this Order, covers all the relevant issues in dispute, only that motion will be discussed.

I

The first basis for defendants' motion is that there is no showing or allegation of a direct relationship, within the contemplation of the antitrust laws, between plaintiffs and defendants, i. e., plaintiffs are producers of raw milk and defendants engage in practically every other activity involving milk and dairy products **except** production of the raw product. Averred is lack of privity of contact, direct relationship, or mutual competition.

This is defendant's strongest point and is successfully dispositive of the motion, which must be granted.

Inquiry here goes to the question of "directness." The first judicial discussion of directness, i. e., that the loss not be derivative, can be found in *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 709 (3rd Cir. 1910). There a shareholder-creditor-employee of a photographic supply house driven into bankruptcy by prohibited conduct was denied recovery in any of the capacities. His injuries were considered too remote within the contemplation of the Act, the Court saying that "before bankruptcy a right of action, of the character in question, resided . . . in the corporation, and subsequent to bankruptcy . . it resided in the trustee."

The *Loeb* doctrine has been interpreted to require that the plaintiff have direct relations (be in privity of contract) with the wrongdoer, and has been used as an effective bar to suits by shareholders,[4] officers,[5] employees,[6] and creditors,[7] for personal losses caused by injury to the corporation. The cause of action accrues only to the corporation for which it can bring suit, or by a shareholder's derivative suit.

Despite the broad language of the Act, a person does not have a cause of action when his losses are caused by an interruption or diminution of profitable relations with the party directly affected, the party in privity. *Snow Crest Beverages, Inc., v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. (1956); *Volasco Prod. Co. v. Lloyd A. Fry Roofing Co.*, 308 F. (2d) 383 (6th Cir. 1962), *cert. den.*, 372 U. S. 907 (1963); *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 35 F. R. D. 198, 199 (D. Mass. 1964) (Dictum). Note also the excellent and thorough discussion of standing to sue in 64 Columbia Law Rev. 570 (1964), from which this Court has paraphrased generously.

It has been argued that the decision of *Karseal Corporation v. Richfield Oil Corporation*, 221 F. (2d) 358 (9th Cir. 1955), permitting recovery by the plaintiff who was not in privity with the defendant, was unaffected by *Snow Crest*, decided in 1956. However, the effect is the same, for competitors of the violator are typically considered to be

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[4] Note *Bookout v. Schine Chain Theatres, Inc.*, 253 F. 2d 292 (2nd Cir. 1958); *Peter v. Western Newspaper Union*, 200 F. 2d 867, 872 (5th Cir. 1953); *Gerli v. Silk Ass'n of Amer.*, 36 F. 2d 959 (S.D.N.Y. 1929); *Martens v. Barrett*, 245 F. 2d 844 (5th Cir. 1957); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 407 (S.D.N.Y. 1961); *Snow Crest Beverages, Inc., v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd*, 113 F. 2d 114 (2nd Cir. 1940); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. den.*, 372 U. S. 907 (1963).

[5] *Sargent v. N.B.C.*, 136 F. Supp. 560 (N. D. Cal. 1955); *Gerli v. Silk Ass'n of America, supra* note 4; *Corey v. Boston Ice Co.*, 207 Fed. 465, 466 (D. Mass. 1913).

[6] *Gerli v. Silk Ass'n of America, supra* note 4; *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E. D. La. 1963), the Court there noting: "These plaintiffs are employees of Linesman Service and not operators of their own businesses or competitors of any of defendants. As such, they have no standing in these proceedings."

[7] See *Gerli v. Silk Ass'n of America, supra* note 4.

in privity for the purposes of Section 4 of Clayton. Karseal, a manufacturer of automobile polish, complained that it was unable to make sales to service stations that had entered into exclusive dealing arrangements with the defendant. Karseal sold its polish through independent distributors rather than its own salesmen, and the defendant contended that as a consequence Karseal was not in privity with the wrongdoing service stations. However, the Court reasoned that Karseal was "aimed at" with enough precision to entitle it to maintain a treble damage suit, reasoning that the exclusive dealing contracts were aimed at excluding competing products, and thus competing manufacturers, from the market. 221 F. (2d) at 362.

Karseal and *Snow Crest* can be differentiated then as follows:

a. In *Snow Crest* plaintiff manufactured and sold extracts which were used as a major ingredient in the manufacture of beverage syrup, whereas the defendant manufactured and sold syrup. In *Karseal* the plaintiff and the defendant handled the same product—automobile polish.

b. In *Snow Crest* the plaintiff, accordingly, was not in competition with the defendant, whereas in *Karseal* the plaintiff and the defendant were in competition even though not in privity.

These substantial differences remain in the case at bar. The plaintiffs and the defendants handle different products —the plaintiffs produce raw milk; the defendants use this ingredient as the major ingredient in the manufacture of pasteurized, homogenized, Vitamin D fortified, Grade A, Class 1, packaged milk. As a consequence, the plaintiffs and the defendants, as in *Snow Crest,* are not in competition and not in direct relationship. Moreover, other differences exist. There was an exclusive dealing agreement in *Karseal.* In the case at bar there is no exclusive dealing agreement; but, rather, the defendants sell competitors' products, and some of the defendants do not even handle the milk of the co-defendant Paradise. Finally, the competitive practice has different aims. In the *Karseal case* competitive practice was aimed at the defendant-competitors. In the case at bar the competitive practice of Paradise is aimed at the retail door-to-door distributor-competitor—not at the plaintiff farmers.

Any doubt that directness of injury is fundamental to a suit was laid to rest by the Sixth Circuit in 1962 in *Volasco Products v. Lloyd A. Fry Roofing Company,* 308 F. (2d) 383, *supra.* There recovery was denied plaintiff-supplier because the injury was not "direct", but this issue was not contested with respect to plaintiff-competitor, whose right of action was affirmed. The Court noted at page 395:

> "It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the anti-trust laws directed against the supplier's customer."

Volasco was appealed in 1963 to the United States Supreme Court, which denied certiorari. See note 4. The pleadings show on the face that the plaintiffs-suppliers' customers are various distributors not party to the present proceeding. The defendants are competitors of these non-party distributor-customers of the plaintiffs-suppliers. Assuming that the defendants are in conspiracy and are restraining trade, to paraphrase *Volasco*:

> "It is well established in the law that the plaintiff-farmer-supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the anti-trust laws directed against the plaintiff-farmer-supplier's customer."

II

Though it has been concluded that defendants' motion to dismiss should be granted, the other grounds will be discussed to avoid piecemeal disposition and so that all the parties can better ascertain exactly where they stand.

Defendants' second ground to dismiss is that the prices are regulated by the State of South Carolina by an appropriate administrative agency, the South Carolina Dairy Commission. Note the affidavit of counsel which is attached as Appendix II.

From this affidavit, which plaintiffs do not dispute, it seems as a matter of "substantial justice" that defendants are doing everything they can to obey the law. They are selling milk above cost, they are making a profit, and even more importantly, they have obeyed the dictates of the

State administrative procedures. They have run the entire State administrative and judicial gauntlet. The word "exhaustion" is used in some cases.

Nevertheless, this is not a sufficient basis to dismiss or perhaps to invoke summary judgment. See *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 35 F. R. D. 198 (D. Mass. 1964). And, as the Supreme Court noted in 1945, "Regulated industries are not *per se* exempt from the Sherman Act." *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456; *reh. den.*, 324 U. S. 890; 58 C. J. S. *Monopolies* § 25, *Cf., Eastern R. Conf. v. Noerr Motors*, 365 U. S. 127, 136. Accordingly, as a matter of law, this basis to dismiss is not sufficient.

III

Defendants' third ground, namely that there is a defect in the parties plaintiff, is valid, though the defect is curable if there be standing to sue.

From the record before the Court it appears beyond peradventure that the cooperative is a non-profit making corporation.[8] How can a non-profit making corporation suffer injury to its business? The term "profit" seems inextricably tied up with the word "business." A cooperative or trade association must show that the claim asserted is the organization's. The plaintiff must be the real party in interest. Rule 17(a), Fed. Rules Civ. Pro., *Farmers Co-op Oil Co. v. Socony-Vacuum Co.*, 133 F. (2d) 101, 103 (8th Cir. 1942). There is no showing whatever that the individual members of the association have assigned whatever cause of action they may have to the association.

For purposes of the motion, admitting *arguendo* that a valid cause of action exists, it seems that the only proper parties are the two officers of the association who brought the action in their own name, assuming damage, proximate cause, etc. There does not seem to be any authority for them to bring an action in a representative capacity. They are only a "real party in interest" for themselves.

This so-called defect in the parties is not a determinative aspect of this matter, because of the liberality implict

[8] The Charter of plaintiff association states: "This association shall be organized and operated on a non-profit cooperative basis . . ." See Appendix I, *infra*.

in Rule 20, Fed. Rules Civ. Pro. See *United States v. Carolina Warehouse Co.*, 4 F. R. D. 291, 293 (W. D. S. C. 1945). Thus, it would seem that the individual farmers, members of the association, would be permitted to join, in accordance with Rule 20, again assuming for purposes of discussion that they had a cognizable cause of action.

IV

Defendant's motion to dismiss, alleging nonapplicability of Section 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, is meritorious.

The Complaint alleges that defendants' activities "has caused milk and milk products to be sold in many markets in the State of South Carolina at unreasonably low prices contrary to . . . Section 3 of the Robinson-Patman Act, making it a criminal offense to sell at unreasonably low prices to suppress competition or eliminate a competitor." Plaintiffs contend that the interdictions of Section 3 "are to be considered in determining violations of the Sherman and Clayton Acts." Plaintiffs cite as authority therefor *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 119.

Mr. Justice Harlan, speaking for the Supreme Court in *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, stated:

> [I]t seems plain that the rule *expressio unius exclusio alterius* is applicable, and that the definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment here that the Robinson-Patman Act may be colloquially described as an "anti-trust" statute. And since no one claims that § 3 of the Robinson-Patman Act can be regarded as an amendment to the Sherman Act or the Wilson Tariff Act, the precise issue before us is whether Congress made that section of the Robinson-Patman Act a part of the Clayton Act, thus making it one of the "anti-trust laws" whose violation can lead to the private causes of action authorized by §§ 4 and 16. For the reasons stated below we hold that this is not the case.

355 U. S. at 376. See also page 382. A like result was reached in *Safeway Stores, Inc. v. Vance*, 355 U. S. 389, decided the same day.

See also *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 306 F. (2d) 61, 62 (3rd Cir. 1962) where Judge Hastie pointed out:

> Appellant predicates its claim upon three separate provisions of the federal statutes. Its first contention is that a civil cause for violation of an "anti-trust law" arises out of Esso's sale of fuel oil in competition with appellant at an unreasonably low price in violation of Section 3 of the Robinson-Patman Act. . . . However, as a matter of law the contention that a civil anti-trust claim can arise in this way is contrary to the holding of the Supreme Court in *Nashville Milk Co. v. Carnation Co.*, 1958, 355 U. S. 373, 78 S. Ct. 352, 2 L. Ed. (2d) 340. Therefore, an inferior federal court must reject this theory of liability.

By the same token, this Court must reject plaintiffs' theory of liability on this basis as well.

Defendants' motion to dismiss should be granted for the reasons given above. Accordingly, defendants' motion is granted.

Judgment will be entered with costs to follow.

And it is so Ordered.

ROBERT W. HEMPHILL,
United States District Judge.

Columbia, S. C.,
May 15, 1965.

APPENDIX I—TO DISTRICT COURT ORDER

ARTICLES OF INCORPORATION OF SOUTH CAROLINA COUNCIL OF MILK PRODUCER ASSOCIATIONS

• • •

Article II—Purposes

The purposes for which this association is formed shall be:

(1) To coordinate the efforts of milk producers in building and maintaining a sound market for dairy products.

(2) To direct producer effort toward the bringing about of an adequate supply of locally produced milk of the highest quality to meet the needs of the consumers at all times.

(3) To participate in all projects designed to promote the sale and consumption of dairy products at a higher level.

(4) To effectively move surplus milk so that it will bring the producer the best return and at the same time avoid the possibility of breaking down local market prices.

(5) To provide factual information on marketing trends, future developments, and changes in marketing conditions to enable producers to meet their rapidly changing problems.

(6) To foster and promote a harmonious and close relationship between producers and distributors, comsumers, institutions and other groups interested in the growth and welfare of the dairy industry in South Carolina.

(7) To improve the relationship between milk producers and the general public by providing factual information for a better understanding of the complex problems of the dairy industry.

(8) To perform any other service which may be mutually agreed upon by the members and which is in conformity with the act under which the association is incorporated and amendments thereto.

Article III—Powers

This association shall exercise and possess all the rights, powers, and privileges necessary or incident to the purposes for which this council is organized or to the activities in which it is engaged, and in addition thereto any other rights, powers, and privileges conferred on cooperative associations of this kind by the act under which it is incorporated and amendments thereto and any other rights, powers, and privileges granted by the laws of the State of South Carolina to ordinary corporations except such as are inconsistent with the express provisions of the Coopera-

tive Marketing Act of South Carolina as amended, and to do any such things anywhere; and the enumeration of the foregoing powers shall not be held to limit or restrict in any manner the general powers which may by law be possessed by this corporation, all of which are hereby expressly claimed.

* * *

Article VII—Membership

This association shall not have any capital stock, but shall admit applicants to membership in the association upon such uniform conditions as may be prescribed by the board of directors of the association, or in its bylaws. This association shall be operated on a cooperative basis for the mutual benefit of its members as producers, and membership in the association shall be restricted to cooperative associations of milk producers. Voting rights in the council shall be in proportion to the number of producers belonging to the member association, as set forth in the by-laws of the council. The property rights and interests of each member association shall be unequal; and shall be determined and fixed in the proportion that the patronage of each member association shall bear to the total patronage of all the members with the council, but in determining property rights and interests all amounts allocated to each patron or evidenced by certificates of any kind shall be excluded. New members admitted to membership shall be entitled to share in the property of the association in accordance with the foregoing general rule.

Article VIII—Non-Profit

This association shall be organized and operated on a non-profit cooperative basis for the mutual benefit of its patrons as producers. Therefore, at the end of each fiscal year, net margins and/or proceeds as shown by the annual report of the auditors shall be allocated as set out in the association's by-laws and each patron shall be notified of his allocation.

APPENDIX II—TO DISTRICT COURT ORDER

Affidavit

PERSONNALLY appeared FALCON B. HAWKINS, who, being duly sworn, deposes and says:

That during the period involved, from January 1963 until the filing of the Complaint of the within proceeding in November 1964, he served as one of the attorneys involving the parties in the milk dispute;

That, upon information and belief, the Defendants, Newton and other individual proprietors of various Piggly Wiggly Stores, purchased the Paradise Dairy of Orangeburg in January 1963; renovated said dairy with new equipment during February and March of 1963, engaged additional South Carolina farmers to furnish milk for the dairy, and in April 1963 commenced selling milk above cost to the Piggly Wiggly Stores and competitors on an equal basis; that this was done after numerous unsuccessful efforts had been made to obtain a wholesale price for milk from various dairies in South Carolina; that said dairies refused said wholesale price and fixed the price to the Defendant stores at a level that required the stores to sell to the consumer at the same price as the dairies were selling to the consumer by door-to-door delivery.

That after the Piggly Wiggly Stores commenced selling milk above cost, the Dairy Commission called a public hearing, declared the dairy industry threatened with economic chaos, and, as a result, on May 1, 1963, promulgated Regulation 4 (I), mandating that milk could not be sold at less than cost; that, thereupon, Paradise requested a hearing by the Dairy Commission to determine its cost; that the Commission countered that it would give a hearing only after Paradise had been audited; that Paradise agreed to this audit, which was conducted by the Dairy Commission accountants on May 7, 8 and 9, 1963, at Orangeburg; and that on the evening of May 9th, the Commission withdrew its auditors on a disputed basis; i. e., the Commission contending the records were insufficient, and Paradise contending the Commission was attempting to delay; that, thereupon, Paradise, on May 10th, motioned the Commis-

sion before Judge Louis Rosen, returnable May 15th, asking among other relief for an Order to require the Commission to grant Paradise a hearing; that Paradise made it clear that it would abandon the Judge Rosen proceeding if the Commission would grant it a hearing; that the Commission then expressed its desire to inspect the records of Piggly Wiggly Wholesale, Inc., in Charleston, which was granted; and the Commission's auditors conducted such inspection on Monday, May 13th. However, the Commission refused to grant a hearing, and so Judge Rosen on May 15th ordered the Dairy Commission to give Paradise a hearing; that this hearing was held on May 22nd and 23rd, 1963, resulting in a 5-3 decision by the Commission on May 27th of a cost of 48¢ for a half gallon of milk. Paradise appealed this decision, and the the Piggly Wiggly Stores, on May 25th, obtained an Order from Judge J. B. Pruitt to allow the stores to sell milk at a competitive cost. Thereupon, on June 11th, the Commission motioned Paradise, the Piggly Wiggly Stores, and others before the Supreme Court of South Carolina asking the Court to take Original Jurisdiction and again alleging, *inter alia,* injury to the within Plaintiff farmers. The Supreme Court refused Original Jurisdiction on June 13th. Conferences were held between counsel for Paradise and the Commission, and it was agreed that the Commission should choose auditors Paradise would be subjected to a thorough audit, and then a hearing granted; and pending a finding of the cost of Paradise the dairy would raise its prices to the non-competitive level fixed by its competitor dairies prior to April. The Commission chose Price-Waterhouse of Chicago as auditors, and also retained Dairy Services, Inc. of Lexington, North Carolina as the dairy analyst. An extensive audit was made during the month of July and the first part of August, and upon completion the Commission conducted a hearing on August 6th and 7th, and thereafter, by October of August 23rd, refused to determine a cost for Paradise. This was appealed, and Judge John Grimball of the Court of Common Pleas conducted numerous hearings in October, November and December, and then determined by Order of December 18th a cost for Paradise for one-half gallon of

milk at 41.767¢. Paradise has continued to sell at a price above this cost since. However, the Dairy Commission, in an attempt to contravene the order of Judge Grimball of December 18, 1963, issued its own Order of December 27th requiring Paradise to submit to a new hearing, which was conducted on January 17, 1964, and on January 28th the Commission ordered the new price for a half-gallon of milk to be 46.664¢, stating, ". . . The Commission hereby considers that this price determination supersedes and replaces the determination of the Court in the Order of December 18, 1963." However, Judge Grimball, by Order of March 11, 1964, terminating the appeal of the Commission from his Order of December 18, 1963, stated, ". . . the Order of this Court of December 18, 1963, is in full force and effect." The Commission then countered with a request for a restraining Order against Paradise before Judge Grimball, which by Order of March 23, 1964, was denied; and again Judge Grimball stated, ". . . the Order of this Court affecting the parties dated December 18, 1963, is in full force and effect." Paradise appealed the Commission's finding and order of January 28th, which on March 31st came on before Judge Grimball, who was faced not only with determing the merits of the appeal, but obviously confronted with the practical problem of terminating the legal maneuvers of the Dairy Commission to thwart due process. Evidently, the Judge determined to withhold the Order as the best maneuver to end maneuvers, for finally, on December 2, 1964, the Judge stated, in reversing the Order of the Dairy Commission of January 28th, ". . . it is apparent that the Dairy Commission has attempted to change the December 18, 1963, Order of this Court without the necessary factual basis for so doing. This cannot be permitted."

That at the initial hearing before the Dairy Commission on May 22, 1963, the present principal Plaintiff, George Tupper, President of the South Carolina Council of Milk Producers, sat as a Commission member; and the South Carolina Dairy Association of over 300 dairy farmers who, on information and belief, comprise a majority of the Plaintiffs, were also represented by counsel who participated in the hearing. Later, the Coastal Milk Producers Association,

which, upon information and belief, comprise a substantial number of the present Plaintiffs, was represented by counsel and participated in the second Dairy Commission hearing on August 6 and 7, 1963. The principal Plaintiff, Tupper, was then President of the Coastal Milk Producers Association, and over the objection of these Defendants refused on motion to disqualify himself, and participated as a Commissioner hearing his own case. Again, in the hearings before Judge Grimball, the South Carolina Dairy Association and the Coastal Milk Producers Association, the membership of which comprises, upon information and belief, the majority of the Plaintiffs, were represented by counsel and participated in the hearings. That, thereafter, at the hearing before the South Carolina Dairy Commission on January 17, 1964, the principal Plaintiff, Tupper, participated, over the objection of the Defendants, and refused on motion to disqualify himself. That at each stage of the proceeding, whether before the Commission, the Supreme Court, or the Circuit Judges, the issues of price discrimination and the alleged for injury to the present Plaintiffs were considered, and at every stage it was conceded by the Plaintiff, Tupper, the majority of the present Plaintiffs, and Counsel, and the Dairy Commission that Regulation 4 (I), preventing sales below cost, would prevent injury to the dairy farmer and eliminate discriminatory or monopolistic practices in the dairy market.

That Regulation 4 (I) was promulgated, and the Court has held that these Defendants' sale of milk during the period in question has been pursuant to State-imposed pricing and practices.

FALCON B. HAWKINS.

APPENDIX C

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 14545-6-7

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Volasco Products Company,
Plaintiff-Appellee,

v.

Lloyd A. Fry Roofing Company,
Defendant-Appellant.

Volunteer Asphalt Company,
Plaintiff-Appellant,

v.

Lloyd A. Fry Roofing Company,
Defendant-Appellee.

Volasco Products Company,
Plaintiff-Appellant,

v.

Lloyd A. Fry Roofing Company,
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided September 12, 1962.

Before: Cecil and O'Sullivan, Circuit Judges, and Boyd, District Judge.

Cecil, Circuit Judge. These appeals are from the United States District Court for the Eastern District of Tennessee. Northern Division. Volasco Products Company and Volunteer Asphalt Company, as plaintiffs, brought an action against Lloyd A. Fry Roofing Company, defendant, charging it with violation of the anti-trust laws, to their damage. The parties will be referred to as plaintiffs and

defendant, as they were in the District Court, or as Volunteer, Volasco and Fry.

The action arises under the Sherman Act and the Clayton Act, Title 15 U. S. C., sections 1-27. The particular sections of the Sherman Act involved are sections 1 and 2 (Title 15, sections 1 and 2) the pertinent parts of which are as follows: Sec. 1 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Sec. 2 "Every person who shall monopolize, or attempt to monopolize, or cmbine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several staes, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

Section 2 (a) and 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act (Sections 13 (a) and 13 (b), Title 15, U. S. C.) are invoked by plaintiffs and so far as pertinent read as follows: Sec. 2 (a) That "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . And provided further, That nothing herein contained shall prevent price changes from time to time . . . in response to changing conditions affecting the market for or the marketability of the goods concerned."

Sec. 2 (b): "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the

burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good-faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Under section 4 of the Clayton Act (Section 15, Title 15, U. S. C.) any person who is injured in his business or property, by reason of anything forbidden in the above quoted anti-trust laws, may sue for damages in a District Court of the United States and recover threefold the damages sustained, together with costs and a reasonable attorney fee.

The plaintiffs are corporations organized and existing under the laws of the State of Tennessee and doing business in that state, with headquarters at Knoxville. Both corporations are owned by the same stockholders and have the same officers. Volunteer was organized in 1954 for the purpose of operating an asphalt refinery for both road and roofing asphalt. Volasco was organized in 1955 for the purpose of manufacturing asphalt roofing materials, including asphalt saturated felt, asphalt roll roofing, and asphalt shingles. Volunteer had been operating its refinery since 1954 and Volasco had been manufacturing and selling saturated felt, as well as some other asphalt roofing products since 1955. Volasco never got into production of roll roofing and asphalt shingles.

Fry is a corporation organized under the laws of Delaware, is doing business in Tennessee and is the largest manufacturer of asphalt roofing products in the United States. It owns and operates nineteen plants strategically located throughout the United States. Its closest plants to Knoxville are at Memphis, Tennessee, and at Brookville, Indiana. The defendant, with seven other large companies,

do approximately sixty-five percent of the business in the United States in asphalt roofing, siding, felts and shingles.

Briefly stated, the plaintiffs charged that the defendant cut prices in the Knoxville area, where the plaintiffs did business, below the plaintiffs' prices, while at the same time it maintained higher prices in territory outside of plaintiffs' limited field of operations. They also charged that the defendant combined and conspired with other large manufacturers of asphalt products to engage in an identical pricing program, for the purpose of creating a monopoly and destroying competition.

The issue as presented by the complaint are substantially and briefly as follows; 1. Did the defendant Fry conspire with one or more other manufacturers of roofing products to fix prices in violation of the anti-trust laws within an approximately 200-mile radius of Knoxville, Tennessee? 2. Did the defendant alone or in combination with other roofing manufacturers, monopolize or attempt to monopolize the sale of asphalt roofing products in the above area by fixing prices of such products in the area lower than prices fixed in other non-competing areas, in violation of the anti-trust laws? 3. Did the defendant, during the relevant period, discriminate in prices between two or more purchasers of asphalt roofing products on a geographic basis by charging purchasers within the approximate 200-mile radius of Knoxville area a lesser price than purchasers outside that area, the effect of which discrimination may have been substantially to lessen competition, to create a monopoly or to injure, destroy or prevent competition, in violation of the anti-trust laws? And if the defendant did so discriminate in prices within the relevant area, did it do so in good faith to meet an equally low price of its competitors? 4. Did the plaintiffs suffer damages as a direct and proximate result of any of the alleged violations of the anti-trust laws by the defendant?

The case was tried to a jury and a verdict was returned in favor of the plaintiff Volasco Products Company in the sum of One Hundred Thousand Dollars ($100,000). The District Judge trebled this amount and gave judgment to

the plaintiff Volasco Products Company for Three Hundred Thousand Dollars ($300,000), plus Sixty Thousand Dollars ($60,000) attorneys' fees. (Section 15, Title 15, U. S. C.) The District Judge also entered an order of injunction against the defendant enjoining it from further violation of the laws in respect to the matters charged in the complaint. The defendant appealed and this appeal is number 14545 on the docket of this Court. At the close of the plaintiffs' testimony, the trial judge directed a verdict in favor of the defendant and against the plaintiff Volunteer Asphalt Company. Volunteer appealed and its appeal is number 14546 in these appeals. Hereinafter the term "plaintiff" will be used in the singular to mean Volasco. The District Judge ruled against Volasco on certain items and claims of damages and it appealed, which appeal is number 14547 on the docket.

We will proceed first with the defendant's appeal. One of the first assignments of error for discussion relates to the first issue stated above and raises the question of whether there was sufficient evidence of conspiracy to submit that issue to the jury.

A review of the record discloses that there was substantial evidence bearing on this issue. When Volasco began manufacturing asphalt saturated felt, in October 1955, it set its price in line with that of the major roofing manufacturers, which was $2.44 per roll. At this time, Fry's price was $2.24. Effective November 1st of that year, Fry reduced its price in the Knoxville area to $1.84 per roll. Volasco then adjusted its price lower and sold at $2.12, $2.11, $2.00 and for one day at $1.84.

On February 19, 1956, Fry published a new price schedule with a new method of marketing, involving an intricate system of zoning. On this schedule, the price of Knoxville was fixed at $2.16 per roll. All of the major roofing manufacturers, effective on February 19th or a day or two thereafter, abandoned their former pricing methods and adopted the Fry plan with its schedule of prices. They published price lists substantially identical with that of Fry, even down to an apparently erroneous zone classification of

Blount County, subsequently changed by Fry. (Ex. 95, 96, 97.)

From February 19, 1956, untll March 3, 1958, Fry published thirteen price schedules. With this last schedule it again changed its pricing system. It abandoned the county zone plan and established a uniform list price for its products for the whole of the United States east of the Rocky Mountains. Under this schedule the price in Tennessee was $1.62 per roll, and with a secret year-end rebate, it was $1.54. As of this date, no other manufacturer had sold asphalt saturated felt as low as $1.62 per roll in the Knoxville area. This schedule was also followed by the other companies. Mr. Fry, Jr., said, on cross-examination, that generally speaking the prices of all major companies had been the same since February 1956.

Beginning with February 4, 1957, there were eight price changes. In all of these, the Knoxville price was substantially lower than the Chicago price, and in all but one, it was lower than the Brookville price. The trend of these prices was downward.

Mr. Lloyd A. Fry, Sr., and his son, Lloyd A. Fry, Jr., were not members of the Asphalt Roofing Industry Bureau, but they attended some of their meetings socially. Mr. Fry, Jr., attended a meeting, at the Westchester Golf and Country Club, in Rye, New York, in October 1955. He attended another one at the Essex House, in New York City, in October 1956. Both Mr. Fry, senior and junior, attended a meeting of the Bureau at the Blackstone Hotel, in Chicago, in the spring of 1956. They did not attend business sessions, but most of the leaders in the industry were present, and the conversations ranged over various subjects, including some discussion of business and its competition.

On February 23, 1956, four days after the effective date of the February 19th new marketing plan, Mr. J. J. Musico, Manager of Fry's Brookville, Indiana, plant, said, in answering the complaint of a customer:

> "I know by this time that you have the new merchandising plan which I understand the entire Indus-

try has adopted and it is with my very honest opinion that this will clean up all this mess. . . .

* * *

". . . I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time. . . ." (Ex. 123.)

In a letter to another customer, on April 13, 1956, he wrote:

"You will note that Blount County is now Zone 2 which puts it in line and I am sure that you will find all other manufacturers quoting on this same basis." (Ex. 124.)

In another letter to a customer, on April 27, 1956, he wrote:

"I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely. As usual, they are taking advantage temporarily, of an attempt to stablize an industry which is long overdue for some stablization from the view point of the wholesalers, dealers and roofers.

* * *

"Nevertheless, I agree that they are a thorn in the side and in due time will be dealt with.

* * *

". . . At that time, if the menagerie is not changed there we will take corrective action." (Ex. 34.)

Some of the smaller roofing companies bore such names as Bear, Elk and Leopard, and were collectively referred to by the industry as "menageries."

"The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances, as well as in an exchange of words." *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 810. See also: *United States v. Parke, Davis and Co.,* 362 U. S. 29, 44. Proof of parallel business behavior does not in itself constitute a Sherman Act offense. "The crucial question is whether respondents' conduct toward petitioner stemmed from

independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. et al.*, 346 U. S. 537, 540.

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (Citations.) Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, Inc., et al. v. United States,* 306 U. S. 208, 227; *United States v. Masonite Corp.,* 316 U. S. 265, 275. See also: *American Tobacco Co. v. United States,* above cited, at p. 810; *United States v. Gypsum Co.,* 333 U. S. 364, 394.

We conclude that the trial judge's instructions to the jury, on the law of conspiracy were correct and that the evidence as herein reviewed was sufficient to take the case to the jury on that issue.

Other assignments of error which relate to the submission of issues to the jury are that the court erred in submitting to the jury the issues of monopolization and attempted monopolization.

Section 2 of the Serman Act (Section 2, Title 15, U. S. C.) provides that it is a violation of the law for a person to monopolize or to attempt to monopolize, or for a person to combine or conspire with any other persons to monopolize any part of the trade or commerce among the several states.

The essentials of monopolization are, the power to raise or fix prices, to eliminate competition at will, or to unreasonably restrict competition, and the intent to exercise that power. *United States v. DuPont & Co.,* 353 U. S. 586, 592; *United States v. DuPoint & Co.,* 351 U. S. 377, 389; *American Tobacco Co. v. United States,* 328 U. S. 781. 811; *United States v. Griffith,* 334 U. S. 100, 107.

The evidence discloses that the defendant was the largest manufacturer of asphalt saturated felt in the United States. It was not the largest company manufacturing this product and in 1958 it was responsible for about twelve and one-half percent of the total sales of the industry in the United States. Some ten or eleven large companies were in the field and it was a highly competitive article. The relevant area in this case is described as the territory within two hundred miles of Knoxville. Most of the large companies, including the defendant, were selling in the relevant area during the years 1956, 1957 and 1958. The combined production of these large companies accounted for more than sixty-five percent of the gross sales of the industry in the United States, during the years herein involved.

There is no evidence of the percentage of the business which the defendant had in the relevant area. It seems unreasonable and impossible to assume that alone it could have monopolized the business in the Knoxville area with only a twelve and one-half percent of the total business of the country.

Under another claim in this case, it is charged that the defendant entered into a conspiracy with other large manufacturers to control prices in the relevant area, in order to exclude the competition of the small manufacturers of the product in question. We have held herein that there was sufficient evidence on that issue to submit to the jury. In the light of that evidence, we think the plaintiffs failed to make a *prima facie* case that the defendant alone had the power to monopolize the industry on asphalt saturated felt. Even if it could be construed that there is evidence that the defendant alone monopolized, or tended to monopolize the industry, there is no adequate instruction to the jury on the subject.

Counsel for the defendant specifically objected to the instructions to the jury for the reason that the trial judge did not separate monopolization and attempted monopolization, individually, from that alleged to have resulted from conspiracy.

Had the trial judge, in his instructions to the jury on monopoly, limited his charge to the part of the statute

pertaining to a combination or conspiracy to monopolize, the issue could have been properly submitted to the jury. In defining the second issue, he said: "Did the defendant, *alone* or in combination with other roofing manufacturers. . . ." (Emphasis added.) Again, in defining monopoly he said: "Any individual or corporation *alone* may offend against the provisions of Section 2 of the Sherman Act by monopolizing or attempting to monopolize interstate trade or commerce." (Emphasis added.) In summing up in his charge on monopoly, he defines conspiracy without relating it to the issue of monopoly.

The judgment of the District Court must be reversed for the reasons, that there is no evidence of monopoly in the relevant area by the defendant, individually, and for the failure of the trial judge to adequately instruct the jury on the issue involved.

The plaintiff Volasco claims that the "two issue" rule is applicable in Tennessee and that, if other issues were properly submitted to the jury, there can be no reversal because of an error in the submission of one issue. The plaintiff cites two cases from the Sixth Circuit, in support of this theory. *Louisville & Nashville Railroad Company v. Rochelle,* 252 F. (2d) 730, C. A. 6, and *Atlantic Coastline Railroad Company v. Smith,* 264 F. (2d) 428, C. A. 6. These cases are both diversity cases tried in Tennessee where the two-issue rule prevails (*Tenn. Cen. Ry. Co. v. Umenstetter,* 155 Tenn. 235) and under *Erie v. Tompkins,* 304 U. S. 64, the District Court must follow the substantive law of the state. Tennessee and Ohio are the only states in the Sixth Circuit to follow this rule. This case is tried under federal law where the "two issue" rule is not applicable. *Wilmington Mining Co. v. Fulton,* 205 U. S. 60, 78, 79; *Baltimore and O. R. Co. v. Reeves,* 10 F. (2d) 329, 330, C. A. 6; *Chicago and N. W. Ry. Co. v. Garwood,* 167 F. (2d) 848, 857, C. A. 8; *Roth v. Swanson,* 145 F. (2d) 262, 269, C. A. 8; *Atlantic Coast Line R. Co. v. Tiller,* 142 F. (2d) 718, C. A. 4.

Another assignment of error involves an essential and important issue—proof of the proper measure of damages. The Court allowed evidence of damages for loss of profits on asphalt saturated felt, mopping asphalt and coatings. The complaint was filed by the plaintiffs April 17, 1958.

The Court took that date as the cut-off date for damages and allowed no proof of damages subsequent to that time. Volasco began its operations in October 1955. The crucial years for which Volasco claims damages are the years ending April 17, 1957 and 1958.

The plaintiff offered evidence to establish that had it not been for the alleged illegal competition of the defendant, it would have manufactured and sold 115,000 rolls of asphalt saturated felt in 1957 and 195,000 rolls in 1958. To arrive at the potentials, George C. Krug, president of Volasco, assumed that mopping asphalt and felt moved in a certain relationship to each other. On this basis he worked out a formula as follows: For the year ending April 30, 1956, Volasco sold 21,287 drums of asphalt. During the next year, it sold 52,598 drums. This was an increase of 247 percent the second year over the first. For the first full year of felt sales, ending April 30, 1957, Volasco sold 78,914 rolls of felt. On the theory that there would be a corresponding increase in felt the second year over the first, as there was between the first and second years in mopping asphalt, Mr. Krug took 247 percent of the felt sales for the year 1957 and arrived at a figure of 194,917 rolls as the potential for the year ending in April 1958.

Mr. Krug then drew a graph (Ex. 197) with the number of rolls indicated vertically along the left side of the graph and the time running horizontally along the bottom. September 1955 was represented as the zero point, at the lower left-hand side of the chart. A straight line was then drawn diagonally to the upper right-hand corner representing 195,000 rolls in April 1958. This diagonal line crossed the date line of April 1957, at 120,000 rolls. Mr. Krug reduced this figure by 5,000 rolls and took 115,000 as the number of potential rolls for the first full year of manufacture. Thus we have the potential for the second year calculated on the basis of the actual number of rolls for the first year. Then the potential for the first year is determined from the potential of the second year.

This we think is a fallacious method of calculation for the reason that there is no evidence to support the claim that there is a general overall pattern that mopping asphalt and felt move in any particular relation to each other. There

is no complaint that the alleged illegal competitive prices involved mopping asphalt. Mr. Krug testified that mopping asphalt fell off with sales of felt but he made no explanation of this. Maybe sales of that product were not pushed. We do know that the salesman was taken off the road when the competition on felt became oppressive. Furthermore, it is not reasonable that business will increase in the proportion indicated on the graph. The trial judge ruled out evidence that would have carried this business progression on in a continued straight diagonal line, through 1960 and 1961. This has no bearing on the case, except to point up the fallacy of the clam.

As we have previously said, felt was a highly competitive article. Assuming legitimate competition of the ten or eleven large companies in the field, each of which was entitled, in good faith, to meet competition, the plaintiff could not have expected to dominate his chosen area, to the extent of increasing sales 247 percent a year.

In order to double-check his projection, for the first year of felt sales, Mr. Krug referred to his customer accounts and worked out another formula. He took the first year of Volasco's operation, ending in September 1956, and found that at the end of that year the company had 141 customer accounts and sold them 57,941 rolls of felt. Starting with no accounts at the beginning of the year, the average number for the year was 70. This would be equivalent to 822 rolls per account. For the year April 1956 to April 1957, the company started the year with 98 accounts and ended it with 183. This was an average of 140 accounts for the year. On the basis of 822 rolls per account, the projection for the year was 115,491 rolls.

If the company maintained its 98 accounts and received 85 new ones during the year—what did it sell to those accounts? Did it sell mopping asphalt and coatings only? Or did it sell felt? If they sold some felt to these customers, how were they affected by the alleged illegal competition? Did these customers buy some felt and then refuse to buy more because of the lower prices of the alleged conspiracy? There is no evidence to show why these customers did not buy their alleged quota of 822 rolls. If they bought mopping asphalt and coatings only, then the claim that asphalt and

felt move in a fixed relation to each other fails. Actual sales of asphalt increased to 59,430 drums in 1958, an increase of about thirteen per cent over 1957. During the same period, felt decreased from 78,014 rolls in 1957 to 61,271 rolls in 1958. In the two succeeding years, as shown by exhibit 163, sales of asphalt increased to 72,856 and 79,915 drums, respectively. During these same years, felt sales decreased to 50,326 and 37,729 rolls, respectively. While the court did not allow the plaintiff to prove damages for the years 1959 and 1960, the evidence does refute Mr. Krug's claim that when felt sales fall off the sale of asphalt also diminished.

Mr. Sam C. Bye, an accountant, of Cleveland, Ohio, testified with reference to a market study he claimed he made of the area of Fry's Morehead City, North Carolina, plant, and the area of the plaintiff's plant at Knoxville. He testified that these areas were similar in respect to size, population, and commercial and residential buildings, etc. He further testified that the Fry plant shipped 275,000 rolls of felt in 1957 and 341,000 rolls in 1958. From this he deduced that Volasco would have a potential of 300,000 rolls per year. He then testified "that with an aggressive sales organization and a determination on the part of management to give their customers in the sales area a good service and fast service, I think that it would be entirely reasonable to assume that they could have reached the 195,000 rolls by the end of April 1958." How he arrived at this figure is unexplained. He applied no mathematical formula. It appears to be a figure arbitrarily taken out of thin air. It happens to be the same figure that Mr. Krug had on his graph (Ex. 197) arrived at, as heretofore explained, by an equally unsound method of calculation.

The witness was asked if he had an opinion as to whether the sales activity and the other matters about which he testified were such that Volasco could have reached 195,000 rolls in 1958. When an objection was made to the question, the court asked him if there was any way that he could answer the question from an accounting standpoint. He said that he could do it statistically and then used the same formula that Mr. Krug had used to arrive at 195,000 rolls for 1958. This figure is wholly unrelated to the arbi-

trary one arrived at by the comparison method as above explained.

Mr. Bye conditioned his estimate on an aggressive sales organization and good service, etc., without knowing anything about Volasco's sales organization or its ability to give the kind of service he had in mind. One cannot say Morehead City shipped over 300,000 rolls in a year, therefore, Volasco in another area, even though essentially similar, could ship a similar number of rolls. A number of factors, unknown here, would be involved. We think this comparison was wholly irrelevant to the question of damages in the case at bar and that the trial judge was in error in admitting it into evidence.

We recognize that the plaintiff is not required to prove its damages with absolute mathematical accuracy and that the plaintiff is not to be denied damages simply because they cannot be computed with exactness. However, the evidence must furnish some approximation of the actual damages so that they may be determined with reasonable certainty. We believe that here the plaintiff in an effort to be specific, has indulged in theories that result in proof that is speculative, remote and uncertain. *Bigelow v. R. K. O. Radio Pictures,* 327 U. S. 251; *Story Parchment Co. v. Paterson Co.,* 282 U. S. 555; *Eastman Kodak Co. v. Southern Photo Co.,* 273 U. S. 359.

We think the plaintiff was not entitled to recover for loss of sales on mopping asphalt and coatings. The prices of these products were not involved in the alleged price manipulations which affected felt sales. The evidence does not support Mr. Krug's statement that sales of those products decreased proportionately with the sales of felt.

Another item of damage allowed by the court was the loss of value to the business. The defendant claims that this was a duplication of damages. In calculating these damages, the plaintiff shows by Exhibit 194 that the actual investment in its property, as of April 18, 1958, was $188,741.13 and that is liquidating value, on the theory that it could not be operated as a felt manufacturing plant, was $148,840.00, a loss of $39,901.13. The plaintiff did not liquidate its business and when it received a verdict

for lost profits and an injunction to prevent further illegal pricing, it was made whole and suffered no loss to its investment in its property. In *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555, the plaintiff was forced out of business. Both elements of damages were allowed in *Atlas Building Products Co. v. Diamond Block and Gravel Co.*, 269 F. (2d) 950, 958, cert. denied, 363 U. S. 843, but there is no indication that they overlapped, as they do here.

The defendant challenges the competency of the testimony of Krug and Bye, with respect to the cost of defendant's production of felt. The purpose of this testimony was competent as bearing on the intention and good faith of the defendant. On the whole, we think the method of calculation was proper. There may have been some assumptions of facts not based on documentary or other evidence in the record. However, the trial judge can watch this and correct it, if necessary, in a retrial. It is interesting to note that the accountant's estimate of the defendant's costs is from $1.88 to $1.98 per roll, as compared with the plaintiff's costs of $1.71 in 1957 and $1.67 in 1958. (Exs. 195, 196.)

We are of the opinion that the objection of the defendant to Mr. Krug's testimony, at the close of the defendant's case, was proper and should have been sustained. This was not rebuttal testimony and while it may not have been prejudicial it should be corrected on a retrial of the case.

Other errors have been assigned by defendant. Wherein such matters relate to discretionary rulings of the District Judge we find no abuse of discretion. Other matters relating to the conduct of the trial and the admission or rejection of evidence may not arise upon a new trial and we find it unnecessary to now consider them.

For the reasons herein stated, the judgment is reversed and the case remanded to the District Court for a new trial consistent with this opinion.

In case No. 14546, the plaintiff, Volunteer Asphalt Company, appeals from the judgment of the District Court

in directing a verdict in favor of the defendant at the close of the plaintiff's testimony.

George C. Krug and his brother, J. A. Krug, early in July decided to go into the asphalt roofing business. Subsequently they determined to handle road asphalt also. At first they operated as a partnership, under the name of Tennessee Associates. In July 1954, they incorporated Volunteer Asphalt Company, for the purpose of conducting the business through a corporation. It was the original intention to carry on the roofing and road asphalt operation through this corporation.

In May of 1955, for financial reasons not pertinent to the issue here, they incorporated Volasco Products Company. The stock of both corporations was entirely owned by the two partners. Volasco became the manufacturer of the roofing products and Volunteer a supplier of raw materials for Volasco's manufacture.

The basis of Volunteer's claim for damages is that defendant's illegal actions reduced Volasco's sales of saturated felt, roof coatings and mopping asphalt, and that therefore the volume of raw material required from Volunteer was reduced and it in turn lost its profit on this material.

The trial judge dismissed Volunteer's complaint for the reason that it was a supplier and not directly injured by the alleged misconduct of the defendant.

This plaintiff claims that there are two theories, either of which will support its right to recover damages from the defendant. The first theory is that George and J. A. Krug owned all of the stock of both corporations and that, therefore, they were operating a unified business.

This flies in the face of all theories of corporate law. Corporations are separate entities, having various privileges, immunities and responsibilities, including the rights to sue and be sued. Individuals who desire to do business through a corporation gain some advantages and probably sacrifice others. The Krugs, for reasons sufficient to them, decided to operate through two corporations and they must now abide by the consequences. "They placed only one of the two corporations in direct competition with defend-

ant. And their choice limits their potential recovery," as was well said in *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, D. C. Mass.

Their theory of a unified business is fallacious for the reason that if it were one business, there would be but one cause of action and one recovery. Of course, the claim for damages may have been larger, but the Krugs chose the field of activity for each corporation. It became corporate business not Krug's business. There are times when the law will look through corporate structure for the real party in interest, but *Chicago, Milwaukee and St. Paul Railway Co. v. Minneapolis Civic and Commerce Association*, 247 U. S. 490, and *California Zinc Co. v. United States*, 72 F. Supp. 591, Court of Claims, as cited and quoted from by the plaintiff, are not applicable here.

The other theory is that because of Volunteer's connection with Volasco, as a supplier of all asphalt used by Volasco, it was directly injured by the defendant's violations of the anti-trust laws.

Counsel for plaintiff cite two cases, neither of which is in point. In *Karseal Corporation v. Richfield Oil Corporation*, 221 F. (2d) 358, C. A. 9, the plaintiff was the manufacturer of a finished product, an automobile polish. The defendant made contracts with its filling stations whereby it would not permit them to use its gasoline, if they sold automobile polish other than the one sponsored by defendant. Volunteer supplies raw material and does not manfacture the finished product which is the subject of this action.

Congress Building Corporation v. Loew's Incorporated, 246 F. (2d) 587, C. A. 7, presents a wholly different state of facts. In this case the plaintiff, owner of a theatre, sued its lessee and certain motion picture distributors for a conspiracy in violation of the anti-trust laws. The plaintiff's rent was based on a percentage of the gross receipts. The claim of the plaintiff was that the consipracy caused a decrease in the gross receipts and, as a result, plaintiff's rent was reduced. The lessee was one of the co-conspirators. The court held that there was an injury and that the alleged acts of the defendants were clearly the direct and proximate cause of the injury.

Counsel for plaintiff quote from the opinion in this case. "Not only is this 'limitation' (that is that a supplier is not directly injured) without support in the language of Section 4, but it appears to have been implicitly rejected by the Supreme Court." In support of this statement, the court cites *Radovich v. Nat'l Football League,* 352 U. S. 445, and *Bigelow v. R. K. O. Radio Pictures, Inc.,* 327 U. S. 251.

We do not find that these cases either reject or accept this limitation. It was not in issue in either case. Radovich was a football player and he brought an action against the National Football League for violation of the anti-trust laws. He was the person directly injured by the alleged illegal conduct. The Court said Congress had allowed for private enforcement of the anti-trust laws by an *aggrieved* party and that the laws protected the *victims* of the forbidden practices, as well as the public. Indirect and remote parties cannot be read into the word "victims."

In the *Bigelow* case, the plaintiffs were the owners and operators of a theatre and were the ones directly injured by the alleged anti-trust law violations of the defendant. In this case, the issue involved the proof of damages. The proof of plaintiffs' damages could not be calculated with certainty. The court said: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (p. 265). This involved the damages of the plaintiffs who were directly injured and cannot be extended to mean indirect or remote parties such as suppliers.

It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the anti-trust laws directed against the supplier's customer. *Martens v. Barrett,* 245 F. (2d) 844, C. A. 5; *Melrose Realty, Inc. v. Loew's, Inc.,* 234 F. (2d) 518, C. A. 3, cert. denied, 352 U. S. 890, rehearing denied, 355 U. S. 900; *Productive Inventions v. Trico Products Corp.,* 224 F. (2d) 678, C. A. 2, cert. denied, 350 U. S. 936; *Conference of Studio Unions v. Loew's Inc.,* 193 F. (2d) 51, C. A. 9, cert. denied, 342 U. S. 919; *Harrison v. Paramount Pictures,* 115 F. Supp. 312, 316, D. C. E. D. Pa., affirmed 211 F. (2d) 405, C. A. 3,

cert. denied, 348 U. S. 828; *Snow Crest Beverages v. Recipe Foods,* cited above.

The judgment of the District Court, in dismissing Volunteer's action against the defendant, is affirmed.

In case No. 14547, the plaintiff Volasco Products Company appeals from adverse rulings of the trial judge on the admission of evidence with reference to its claims on items of damages.

This is a conditional appeal to be considered by the Court only in the event a reversal is ordered in case numbered 14545.

The plaintiff claimed damages on asphalt shingles and roll roofing, on the theory that it was prevented from entering into the manufacture of those items by reason of the conduct of the defendant in violating the anti-trust laws.

Mr. George C. Krug testified that when he and his brother went into the asphalt business, it was their intention to also manufacture roll roofing and asphalt shingles. At the time the complaint was filed, the machinery for making these products had not been purchased. Mr. Krug claimed that the plaintiff had the plant capacity and the capital necessary to purchase and install the machinery required to equip the plant for the production of roll roofing and asphalt shingles. The cost would have been approximately $60,000.

The trial judge rejected the claim for damages on these items for the reason that the proof showed that the plaintiff never had the capacity to produce them, in that it had not installed the plant facilities required for their manufacture.

We think the trial judge was correct in his ruling. There was only a stated intention to enter into this additional production with no overt act performed in connection therewith and no expenditure of money to provide the required facilities. Preparedness and capacity to engage in a business mean more than an intention so to do and an ability to buy the necessary facilities. *Stearns v. Tinker and Rasor,* 252 F. (2d) 589, 606, C. A. 9; *Triangle Conduit and Cable Co., Inc. v. National Electric Products Corporation,* 152 F. (2d) 398, C. A. 3; *American Banana Co. v.*

United Fruit Co., 166 F. 261, C. A. 2, affirmed 213 U. S. 347; Cf. *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 F. 254, C. A. 2.

The plaintiff objected to the measure of damages the trial judge allowed in proving loss to the business. In appeal numbered 14545, we disallowed the item of loss to business, on the ground that it was a duplication of damages. It is not necessary to discuss the question further here.

The plaintiff had a theory of damages which it called its "mature year concept." By this theory, it sought to prove damages subsequent to the date of filing suit, the cut-off date for damages, as adopted by the trial judge. It was claimed by the plaintiff that it would have a progressive growth for about five years and then level off. At the end of this period it would have its mature growth. The theory of the plaintiff is that it was deprived of two years of this maturity by the alleged illegal acts of the defendant. This was tied up with a fifty-year lease on certain river-front property, which the plaintiff claimed would be the life of the business. Therefore, these mature years were forever lost.

The trial judge excluded evidence offered in support of this theory as being too speculative and remote. We agree. It is equally speculative as the proof which we reject in case No. 14545.

The plaintiff claims the right to recover damages that accrued subsequent to the date of filing suit. Counsel for the defendant claim that the court allowed evidence on this element of damages and quotes instructions of the judge to the jury, during the progress of the trial, to that effect. As we read his final instructions to the jury, it appears that he allowed no damages after the filing date of the complaint.

The rule is that the plaintiff should be entitled to recover damages that accrue after the filing date, provided they are proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed. *Lawlor v. Loewe*, 235 U. S. 522, 536; *Flinkote v. Lysfjord*, 246 F. (2d) 368, 394, C. A. 9, cert. denied, 355 U. S. 835; *Connecticut Importing Co. v. Frankfort Dis-*

tilleries, 101 F. (2d) 79, 81, C. A. 2. Such damages must be proved with reasonable certainty and must not be speculative or remote. *Bigelow v. R. K. O. Radio Pictures*, 327 U. S. 251; *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359.

The judgment of the District Court is affirmed in this appeal, except as to the rule above stated for the allowance of damages accruing after the date the action was begun.

APPENDIX D

ORDER SETTLING RECORD
(Filed August 13, 1965.)

The Defendants moved under Rule 75 (h) of the Federal Rules of Civil Procedure for a correction of the record of the within Appeal to the Fourth Circuit. After conferences and agreement with counsel, it is

ORDERED, That the Hawkins Affidavit, or Appendix to the Order of this Court dated May 15, 1965, shall be considered as part of the said Order, and any printing or citation of said Order shall include the Appendix; and, it is

FURTHER ORDERED, That the record include the admission of counsel for the Plaintiffs who stated in open Court that no processors or distributors were party-Plaintiffs to this action; that any persons who process or distribute the Plaintiffs' product are not parties to this action; and it is

FURTHER ORDERED, That this Order settling the record shall be certified and transmitted by the Clerk of the District Court as a supplemental record to the record on Appeal.

AND IT IS SO ORDERED.

ROBERT W. HEMPHILL,
United States District Judge.

Columbia, S. C.
August 12, 1965.

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

United States Court of Appeals

FOR THE FOURTH CIRCUIT

OCTOBER TERM, 1966

No. 520

JOSEPH T. NEWTON, JR., ET AL., PETITIONERS,

versus

SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INCORPORATED, BY AND THROUGH ITS OFFICERS GEORGE TUPPER AND WALTER BELL, JR., INDIVIDUALLY AND AS REPRESENTATIVES OF ALL OF THE MEMBERS OF SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INCORPORATED, RESPONDENTS.

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

United States Court of Appeals

FOR THE FOURTH CIRCUIT

OCTOBER TERM, 1966

NO. ....

JOSEPH T. NEWTON, JR., ET AL., PETITIONERS,

versus

SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INCORPORATED, BY AND THROUGH ITS OFFICERS GEORGE TUPPER AND WALTER BELL, JR., INDIVIDUALLY AND AS REPRESENTATIVES OF ALL OF THE MEMBERS OF SOUTH CAROLINA COUNCIL OF MILK PRODUCERS, INCORPORATED, RESPONDENTS.

The respondents herein pray that petitioner's prayer for a writ of *certiorari* to be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 4, 1966 be denied.

OPINIONS BELOW

The respondents agree to the accuracy of the reprints of opinions below as set forth in petitioner's petition as follows:

(a) Court of Appeals for the Fourth Circuit, entered on April 4, 1966 (360 F. (2d) 414), Petitioner's Appendix A.

(b) United States District Court for the Eastern District of South Carolina entered on May 15, 1965 (241 F. Supp. 259), Petitioner's Appendix B.

The opinion in *Volasco Products Co. v. Lloyd A. Fry Roofing Company*, 308 F. (2d) 383 (6 Cir. 1962), Certiorari denied, 372 U. S. 907 (1963), reprinted as Petitioner's Appendix C does not conflict with the instant opinion.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 4, 1966 (Pet. App. C). On June 29, 1966 Associate Justice Potter Stewart extended the time for filing a petition for a writ of *certiorari* to September 1, 1966. Petition was docketed on September 6, 1966, 155 days after the Court of Appeals judgment.

Rule 22 (3) of the Rules of this Court provides that "(a) petition for a writ of certiorari in (civil) cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law." Section 2101 (c) of Title 28 of the United States Code provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of *certiorari* for a period not exceeding sixty days." Since these limits are jurisdictional, the petition should be dismissed as untimely.

QUESTION PRESENTED

If a plaintiff shows damage *prima facie* in a complaint charging defendants with violation of Section 4 of the Clayton Act, is dismissal of the claim on motion not unwarranted?

STATUTE INVOLVED

SECTION 4, CLAYTON ACT, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U. S. C. § 15.

> Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including attorney's fee.

STATEMENT

This is an action for treble damages brought by the Respondents in the United States District Court in the Eastern District of South Carolina, Columbia Division. It has been expressly brought pursuant to the authorization of Sections 4 and 16 of the Clayton Act, providing for the bringing of private suits for damages sustained and injuctive relief against threatened loss or damage to Respondents by reason of acts alleged to have been committed by Petitioners in violation of Sections 1 and 2 of the Sherman Act.

The complaint was filed November 12, 1964. No answers were filed. All Defendants filed and served motions to dismiss the action. Arguments by Counsel for all parties were presented to the Court on February 25, 1965. Following the arguments, the Court asked for briefs and took the matter under advisement.

On May 15, 1965, the Court issued an order granting the motions of the Defendants and summarily dismissed the action. Formal judgment thereon was entered on May 18, 1965, adjudging that Plaintiffs recover nothing by their complaint against Defendants, costs to be later taxed. Thereafter Plaintiffs perfected an appeal and were heard